STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court No. 157097

Court of Appeals No. 335190

FAYTREON ONEE WEST,

Plaintiff-Appellant,

Case No. 15-005357-NO
Hon. John A. Murphy
Wayne County Circuit Court

v

CITY OF DETROIT, a Municipal Corporation,

Defendant-Appellee.

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DEFENDANT-APPELLEE CITY OF DETROIT'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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Dated: February 16, 2018

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COUNTER-STATEMENT OF JUDGMENT APPEALED

Appellant's Statement is complete and correct, except she fails to state that the application is pursuant to MCR 7.305.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. DID PLAINTIFF FAIL TO COMPLY WITH THE POST-INCIDENT NOTICE REQUIREMENTS OF MCL 691.1404?

The circuit court answered: "Yes."
The Court of Appeals answered: "Yes."
Plaintiff-Appellant answers: "No."
Defendant-Appellee answers: "Yes."

COUNTER-STATEMENT OF THE MATERIAL PROCEEDINGS AND FACTS

This is Plaintiff's FOURTH lawsuit against the City of Detroit alleging a slip and fall on a City street or sidewalk.[1] On May 14, 2014, Plaintiff allegedly slipped and fell on a small pothole on Mansfield Street near Chicago. However, at her deposition, Plaintiff had to be reminded by her attorney that this allegedly happened.

Exhibit B WEST, FAYTREON ONEE, (Page 26:4 to 26:11)

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Q. Did you suffer a slip and fall in the City of Detroit last year?

A. No.

Q. You didn't suffer a slip and fall in the City of Detroit last year?

MR. CHIN: That would have been 2014, the one we're here for.

A. Yes. I'm sorry. My mind is gone. Yes, sir.

After her attorney reminded her why she was suing the City of Detroit, Plaintiff identified the following injuries at her deposition:

WEST, FAYTREON ONEE, (Pages 32:4 to 33:3)

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Q. Okay. As a result of your fall on May 14th, 2014, did you suffer any injuries?

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1 Plaintiff's prior lawsuits against the City of Detroit include 99-901468-NO, 00-011475-NO, and 11-004520-NO, all in Wayne County Circuit Court. The Complaint in this matter is attached as **Exhibit A**.

A. Yeah, it was -- it messed up my injuries I already had.
Q. So what injuries did you suffer?
A. My neck and my shoulder and my upper back. And then I got a pinched nerve in my hand. I didn't have that injury. Oh, yes, I did. It made it worse. So he finally -- I was getting injections in my hand, too. And my arm was feeling better, now it's back hurting again, and now I've got to get injections again.
Q. So as a result of this fall in May 2014, you said you aggravated an injury to your neck?
A. My neck, my shoulder.
Q. And your upper back?
A. My upper back.
Q. And a pinched nerve in your hand?
A. Yes.
Q. Anything else besides those?
A. And now I'm having pain in my lower back.
Q. Pain in your lower back?
A. Yes.
Q. Anything besides your neck, shoulder, upper back, your

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pinched nerve in your hand, and pain in your lower back?

A. No, sir.

On August 8, 2014, the City of Detroit Law Department received a letter notifying the Law Department of Plaintiff's alleged fall. (**Exhibit C**). The envelope and letter were addressed to "City of Detroit Law Department." The notice indicated that Plaintiff had "suffered a broken nose as well as injuries to her mouth, left arm, and both legs in the fall." In her notice, Plaintiff did not identify any injury to her neck, shoulder, upper back or lower back.

At her deposition, Plaintiff admitted that the injuries identified in her notice were limited to abrasions of her nose, mouth, arm and leg.

WEST, FAYTREON ONEE, (Pages 44:6 to 45:5)

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Q. Did you break your nose as a result of this accident?
A. I thought it was broken. It was not.
Q. Okay. Did you suffer injuries to your mouth?
A. Yes.
Q. What injuries did you suffer to your mouth?
A. My mouth was skinned up and it was swollen real big.
Q. So you had abrasions and swelling to your mouth?
A. Yes, and nose.
Q. Did you have any injury to your mouth besides abrasions and swelling?
A. No.
Q. Did you suffer an injury to your left arm in this fall?
A. It was already -- it made it hurt worse, that injury in

my shoulder.

Q. So aside from rotator cuff, any injury to your left arm besides rotator cuff?

A. Just skinned up and bruises.

Q. Did you injure either one of your legs in the fall?

A. One of my knees.

Q. Which knee?

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A. My right one.

Q. And what injury did you suffer to your right knee?

A. It skinned it up.

Q. Any injury besides a skinned knee?

A. No, sir.

The pothole on which Plaintiff allegedly slipped is on Mansfield Street, in front of Plaintiff's home. Plaintiff does not know how long the hole existed.

WEST, FAYTREON ONEE, (Page 27:22 to 27:24)

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Q. Do you know how long that hole was there?

A. No, I do not. I don't know if it's still there. I don't know.

Defendant City filed a Motion for Summary Disposition, because Plaintiff failed to properly serve Defendant with notice of the occurrence of her injury and the alleged defect, as required by MCL 691.1404, and Plaintiff's complaint is therefore barred as a matter of law.

Moreover, there is no evidence of any actionable highway defect in this case and Defendant moved for summary disposition on this basis as well.

At a hearing on September 2, 2016, the circuit court adopted the rationale of *Withers v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2016 (Docket No. 324009), holding that

> Service would be insufficient as it relates to the immunity statute in 1404(2). This service is not service on an individual and as a result does not constitute that they would be lawfully served with civil process of the City. So in light of Woodwards (ph) case the motion is granted. TR 9/2/16 at 6.

Plaintiff appealed to the Court of Appeals, which affirmed the circuit court's decision on December 12, 2017 (**Exhibit L**). This application follows.

STANDARD OF REVIEW

Defendant brought its motion under MCR 2.116(C)(7). "Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by immunity granted by law." *Seldon v Suburban Mobility Authority for Regional Transp*, 297 Mich App 427, 432; 824 NW2d 318 (2012). When a party moves for summary disposition based on governmental immunity under MCR 2.116(C)(7), the Court considers evidentiary support such as affidavits, depositions, and admissions, in addition to the pleadings, to determine whether the claim is barred by immunity. MCR 2.116(G)(5). It is incumbent upon a plaintiff to plead and prove facts to overcome the presumption of governmental immunity: "To survive a motion for summary disposition, [a] plaintiff must allege facts warranting the application of an exception to governmental immunity." *Mack v Detroit*, 467 Mich 186, 198, 199-200; 649 NW2d 47 (2002). "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Poppen v Tovey*, 256 Mich App 351, 354; 664 NW2d 269 (2003).

This Court reviews a trial court's decision to grant or deny a motion for summary disposition de novo. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

Governmental Immunity

Pursuant to the government tort liability act, Defendant is generally immune from tort liability. MCL 691.1401 *et seq*.

> Immunity from tort liability, as provided by MCL 691.1407; MSA 3.996(107), is expressed in the broadest possible language – it extends immunity to all governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000).

Governmental immunity is currently subject to six statutory exceptions. *Robinson v City of Lansing*, 486 Mich 1, 16; 782 NW2d 171 (2010). "[T]he immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki, supra* at 158 (emphasis in original).

One exception to governmental immunity is the "highway exception."

> Under the highway exception to governmental immunity, a governmental agency with jurisdiction over a particular highway has a duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). This includes sidewalks. MCL 691.1401(e). However, before the highway exception can apply, the plaintiff must timely notify the governmental defendant of his or her claim in accordance with MCL 691.1404(1). *Plunkett v Dep't of Transportation*, 286 Mich App 168, 176; 779 NW2d 263 (2009). The notice provided under MCL 691.1404(1) need not be in any particular form, *id*., but must be provided within 120 days of the plaintiff's injury, MCL 691.1404(1); *Burise v Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). The notice must also "specify the *exact* location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." MCL 691.1404(1). *Thurman v Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012) (emphasis in original).

MCL 691.1404 provides, in pertinent part:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. **The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant**. (Attached as **Exhibit D**) (emphasis added).

Liability under the highway exception is also limited by MCL 691.1403, which provides in pertinent part:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place. (Attached as **Exhibit E**).

When a plaintiff suing a governmental entity fails to comply with the notice requirement of MCL 691.1404, summary disposition is required pursuant to MCR 2.116(C)(7). *Rowland v Washtenaw Co Road Comm*, 477 Mich 197; 731 NW2d 41 (2007). In *Rowland*, the plaintiff failed to properly serve the defendant with notice within 120 days of her injury, and the Michigan Supreme Court ruled that the defendant was entitled to summary disposition. Because "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect . . . it must be enforced as written." *Id* at 219. "Statutory notice requirements must be interpreted and enforced as plainly written [and] no judicially created saving construction is permitted to avoid a clear statutory mandate." *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012). Furthermore, Defendant has no burden to show that Plaintiff's failure to comply with the notice caused "actual prejudice" to Defendant. *Rowland*, supra at 200. *Rowland* explicitly overruled earlier cases that imposed such a requirement. *Id.*

I. PLAINTIFF FAILED TO COMPLY WITH THE POST-INCIDENT NOTICE REQUIREMENTS OF MCL 691.1404.

A. Defendant is Entitled to Summary Disposition Because Plaintiff's Claim Under The Highway Defect Exception To Governmental Immunity Is Barred By Plaintiff's Failure To Serve Notice Upon An Individual Who May Lawfully Be Served With Civil Process Directed Against The City of Detroit.

The highway exception, in plain and unambiguous language, requires that notice be served upon "any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency . . . ." MCL 691.1404(2).

Service of process upon a city **must** be made by serving the Mayor, the City Clerk, or the City Attorney. MCL 600.1925(2); MCR 2.105(G)(2). Pursuant to MCL 600.1925, and MCR 2.105(G)(2), the only individuals upon whom service for a city may be made are "the mayor, city clerk, or city attorney."

When engaging in statutory interpretation, a court's primary aim is to discern and give effect to the Legislature's intent. *Nawrocki, supra* at 159. Because the most reliable evidence of the Legislature's intent is the language of the statute, courts begin with an examination of the statute's plain language, affording words their common and ordinary meaning. *Id.*; *McCahan, supra* at 736. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Sprenger v Bickle*, 302 Mich App 400, 403; 839 NW2d 59 (2013)(citation omitted). MCL 691.1402(2) is clear and unambiguous -- for a municipality, service must be made upon an "individual" upon whom civil process can be made -- the mayor, the city clerk, or city attorney.

Plaintiff here did not serve the mayor, city clerk, or city attorney. Rather, she served the Law Department. The Law Department is not an individual upon whom civil process can be served

under MCR 2.105(G) or MCL 600.1925(2). Neither is the "Law Department" an individual who may be served with civil process. The City of Detroit Corporation Counsel (at the relevant time in this case, Melvin Butch Hollowell), is the city attorney, upon whom civil process may lawfully be served. The Corporation Counsel (city attorney) was not served with plaintiff's highway defect notice.

The outcome in this case is controlled by *McLean v Dearborn*, 302 Mich App 68, 836 NW2d 916 (2013) where the Court of Appeals reversed the trial court's denial of summary disposition, holding that service of notice on Dearborn's third party administrator (TPA) did not satisfy MCL 691.1402(2). In *McLean*, plaintiff's initial highway defect notice was served on the city attorney, but it was incomplete. She served a second notice within the 120 day period that cured the defects in the first notice, but did not serve that second notice upon the city attorney. The *McLean* court explained:

> Having determined that the initial notice to defendant was insufficient, we now determine whether the defect was cured by plaintiff's subsequent communication to defendant's TPA. Plaintiff is correct that all the information required by MCL 691.1404(1) does not have to be contained within the plaintiff's initial notice; it is sufficient if a notice received by the governmental agency within the 120–day period contains all the required elements. *Burise*, 282 Mich. App. at 654, 766 NW2d 311. However, we disagree that plaintiff's letter to Broadspire can be considered "notice" to defendant under MCL 691.1404(2). The statute provides that "notice may be served upon any individual ... who may lawfully be served with civil process directed against the government agency...." *Id.* MCR 2.105(G)(2) provides that service of process may be made on "the mayor, the city clerk, or the city attorney of a city." By the plain language of this statute and court rule, service on a TPA is not sufficient. Judicial construction of MCL 691.1404 is not permitted. *Rowland*, 477 Mich. at 219, 731 N.W.2d 41.
> *McLean*, 302 Mich. App. at 78-79.

The *McLean* court rejected the plaintiff's waiver argument and the argument that she could serve someone other than the city attorney where she offered no evidence that the city attorney had appointed anyone to accept service on his behalf under MCR 2.105(H)(1):

> We see no great injustice in requiring plaintiffs seeking to provide notice to defendant under the statute to serve their notices on the correct parties. Although plaintiff asserts that there "should be no requirement that the supplemental notice be served upon the same cast of persons as identified in MCR 2.105(G)," we are not in a position to re-write the statute or the court rule. We reiterate that our Supreme Court has found this notice provision to be both constitutional and unambiguous. *Rowland*, 477 Mich. at 219, 731 N.W.2d 41. *McLean*, supra at 81; See also *McCarthy v City of Trenton*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2014 (Docket No. 316600) (**Exhibit F**) (same).

In *Andrea Jones v City of Pontiac*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2012 (Docket No. 304155) (**Exhibit G**), the Court of Appeals reversed the trial court's denial of summary disposition where the plaintiff had served notice by certified mail addressed to Pontiac's city hall, "Attention: Risk Management." The Court held that the notice did not substantially comply with MCL 691.1404, for three reasons, including that it was not addressed to the mayor, city clerk, or city attorney as required by MCR 2.105(G)(2). Similarly in our case, the notice was addressed to the "City of Detroit Law Department." MCR 7.215(C)(1).

Recently, the Court of Appeals considered these issues as applied to the City of Detroit, in *Withers v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2016 (Docket No. 324009). (**Exhibit H**). In *Withers*, the plaintiff sent her notice by first-class mail to "City of Detroit Law Department." The City of Detroit moved for summary disposition, which the trial court denied. The Court of Appeals reversed the trial court's decision, and found:

> **The law department is not "an individual" and thus does not constitute an entity that "may be lawfully served with civil process against" the city.** *Id.*

The Court of Appeals found that the plaintiff had not complied with MCL 691.1404(2), and therefore, the City of Detroit was entitled to summary disposition. Furthermore, the Court rejected the plaintiff's argument that she had "substantially complied" with MCL 691.1402. The court noted that "… even if 'substantial compliance' could substitute exact adherence to the

statutory words (a proposition which our Supreme Court has soundly rejected), Withers' notice fell well short of 'substantial compliance.'" *Id*.

The entity served in this case was the exact same entity served in *Withers*, and the Court of Appeals held that the notice failed to satisfy the requirements of MCL 691.1404(2). *Withers*, in particular, is directly on point to our case. MCR 7.215(C)(1).

Since *Withers*, the Court of Appeals has issued the same ruling in a published opinion. *Wigfall v City of Detroit*, _____ Mich App _____; _____ NW2d _____ (2017) (**Exhibit M**)2, relied upon by the Court of Appeals in this case at page 3 of its opinion (**Exhibit L**) where it held that "[u]nder MCR 2.105(G), 'the mayor, the city clerk, or the city attorney of a city' are the individuals who may lawfully be served civil process on behalf of a municipal corporation. … The city of Detroit Law Department is not an 'individual,' and therefore, not a being that 'may lawfully be served with civil process against' the city" (citing *Wigfall, supra*). The Court of Appeals panel in this case agreed (**Exhibit L** at 3), noting that Plaintiff's interpretation "… lacks merit because she reads MCL 691.1404(2) in isolation."

In other words, Plaintiff herself states that "… [i]f a claimant fails to follow the method prescribed in the statute and later files suit, the municipality is free to contest the receipt of notice." Plaintiff's Application at 8. Defendant City of Detroit did indeed challenge the sufficiency of notice by its motion for summary disposition. What does **not** follow from the statutory language is Plaintiff's next statement: "The burden would then fall to the claimant to establish that the municipality accepted notice of claim within 120 days." *Id*. This is nowhere in the statute.

Plaintiff does not even address *Wigfall* in her application. Indeed, it was binding on the Court of Appeals panel in our case. MCR 7.215(J)(1). However, even if the *Wigfall* decision had

2 An Application is currently pending in this Court on *Wigfall* (No. 156793).

not been binding on our panel (and the panel did not even mention that fact), based on the line of precedent from *Rowland* to *McLean* to *Withers* to *Wigfall*, the Court of Appeals panel was correct. For the reasons set forth above, Plaintiff failed to serve notice that complied with MCL 691.1404(2) and defendant is entitled to summary disposition under MCR 2.116(C)(7) on grounds of governmental immunity. This Court should, therefore, deny leave to appeal.

B. Defendant's Motion is Based on MCL 691.1404 and Not Service of Process.

Plaintiff has argued that dismissal of her complaint is inconsistent with MCR 2.105(J)(3), which provides that a lawsuit shall not be dismissed for "improper service of process," unless the service failed to inform the defendant of the action within the time provided by the court rules.

However, Defendant is **not** seeking dismissal based on service of process. MCR 2.105 sets out the requirements for service of a summons and complaint. MCR 2.105(A)-(H). The remedy for improper service of a summons and complaint is subject to the limitations of MCR 2.105(J). This case doesn't have anything to do with improper service of a summons and complaint, as the Court of Appeals noted at page 4 of its opinion (**Exhibit L**).

In MCL 691.1404, the Legislature has set forth the requirements for serving notice of a highway defect claim against the City. This Court has held that failure to comply with the statutory requirements of MCL 691.1404 requires summary disposition pursuant to MCR 2.116(C)(7). *Rowland v Washtenaw Co Road Comm*, 477 Mich 197; 731 NW2d 41 (2007).

The issue in this case is whether Plaintiff complied with MCL 691.1404. This Court has held that the remedy for failure to comply with MCL 691.1404 is dismissal. *Id.*

The undisputed evidence in this case shows that Plaintiff's notice was not addressed to or signed for by the city attorney. Plaintiff concedes that she mailed her notice to the City of Detroit Law Department. As the Michigan Court of Appeals recently noted:

> **The law department is not "an individual" and thus does not constitute an entity that "may be lawfully served with civil process against" the city.** *Withers v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2016 (Docket No. 324009). (**Exhibit H**).

See also *Wigfall, supra* (**Exhibit M**).

For these reasons, Plaintiff failed to serve notice that complied with MCL 691.1404(2) and Defendant is entitled to summary disposition under MCR 2.116(C)(7) on grounds of governmental immunity. This Court should, therefore, deny Plaintiff's application.

C. Defendant is Not Estopped from Asserting Plaintiff's Failure to Comply with MCL 691.1404.

The 1984 Detroit City Code, Sec. 2-4-18, creates a mechanism for aggrieved parties to file a claim with the City of Detroit, which is then considered by the City of Detroit (without litigation) for payment. The ordinance provides in relevant part:

> All claims of whatever kind against the city, excluding claims by city employees arising out of the employment relationship, claims against the department of water and sewerage and undisputed claims for services, labor and materials furnished to city departments shall be first submitted to and reviewed by the law department.

As described on the City's website:

> The Claims Section investigates and attempts to resolve claims filed against the City of Detroit, involving both personal injury and property damage allegedly arising from the City's wrong doing or negligence. The purpose of the Claims Section is to provide a simplified procedure for resolving legal disputes without the necessity, time and expense of our formal judicial system. Hence, the claims process serves both the needs of the claimant and the City. http://www.detroitmi.gov/How-Do-I/File/Law-Claims-Information

Pursuant to this ordinance, the City of Detroit handles hundreds of claims a year via the City of Detroit Law Department. The letter attached to Plaintiff's response was provided in response to Plaintiff's notice, which was served on the City of Detroit Law Department. In the letter, a Municipal Adjuster acknowledges receipt of a "claim" under the City ordinance. (Exhibit 8 to Plaintiff's Application).

There is no acknowledgement of Plaintiff's "notice," or reference to MCL 691.1404. Nothing in the letter acted as an inducement to Plaintiff to believe that Plaintiff's obligations under MCL 691.1404 had been fulfilled.

In order to apply estoppel against a municipality, a party must show:

> a good faith reliance upon the municipality's conduct, lack of actual knowledge or lack of the means of obtaining actual knowledge of the facts in question, and plaintiff must show a change in position to the extent that plaintiff would incur "a substantial loss were the local government allowed to disaffirm its previous position." *Parker v W Bloomfield Twp*, 60 Mich App 583, 592; 231 NW2d 424, 428 (1975).

In this case, Plaintiff cannot establish any of these elements. First, the City made no statement about the validity of Plaintiff's notice under MCL 691.1404. Second, Plaintiff cannot show a lack of actual knowledge or lack of the means of obtaining actual knowledge about the requirements of service under MCL 691.1404, because Plaintiff is charged with knowledge of the law. See *Sau-Tuk Industries v Allegan County*, 316 Mich App 122; ___ NW2d ___ ; 2016 WL 3524811 at *11 (2016). Finally, there is no change in the City's position. The facts of this case do not even approach the requirements of the application of estoppel against the City of Detroit.

Moreover, the City cannot alter the law of governmental immunity to allow for an alternate form of service. Just as the City cannot by charter create a cause of action not provided for in the GTLA, it cannot change the legislatively proscribed notice requirements. See *Mack v City of Detroit*, 467 Mich 186, 196; 649 NW2d 47, 53 (2002).

The Court of Appeals panel in *Wigfall, supra*, agreed (**Exhibit M** at 3-4). Therefore, the City is not estopped from seeking dismissal for Plaintiff's failure to comply with MCL 691.1404, and this Court should deny leave to appeal.

CONCLUSION AND RELIEF SOUGHT

Plaintiff has failed to state any claim in avoidance of Defendant's governmental immunity. Plaintiff has failed to state a claim under the "highway exception" because the notice of her injury was not properly served. Consequently, there is no error in the Court of Appeals' decision.

For all of these reasons, Defendant City requests that the Court deny Plaintiff's application for leave to appeal the circuit court's September 20, 2016 Order Granting Defendant's Motion for Summary Disposition (**Exhibit K**).

Respectfully submitted,

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